

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JOHN DIDIER,

Appellant.

No. 33376-7-II

UNPUBLISHED OPINION

Bridgewater, J. – Michael Didier appeals his convictions of residential burglary and violation of a restraining order. He asks this court to reverse his convictions, claiming that the trial court unconstitutionally commented on the evidence when it instructed the jury, using the text of a local court rule, that a court commissioner’s order remained valid unless a judge actually granted a motion for revision. Mr. Didier also challenges for the first time certain closing arguments of the prosecutor as misconduct. Concluding that the challenged instruction accurately stated the law without commenting on the evidence and that the prosecutor’s arguments, in context, did not constitute misconduct, we affirm Mr. Didier’s convictions.

Facts

Mr. Didier considers himself a “citizen of heaven” rather than a U.S. citizen and works with Remedies at Law, 3 Report of Proceedings (RP) (May 19, 2005) at 381, which he describes as an “ecclesiastical law firm” staffed by non-bar members. 3 RP at 380. Mr. Didier’s wife, Judith Didier, petitioned for legal separation. On December 29, 2004, a Pierce County Superior Court Commissioner Pro Tempore granted a temporary order that, inter alia, ordered Mr. Didier to vacate the family home at noon on January 2, 2005, and restrained both parties from “molesting or disturbing the peace” of the other or from “entering the home” of the other. Ex. 1. Mr. Didier attended the hearing without a lawyer, challenging the jurisdiction of the court and filing a pleading¹ based on his understanding of religious and constitutional law that asserted claims against those that he saw as interfering in his family and marriage. Mr. Didier was present when the commissioner announced and signed the temporary order; Ms. Didier’s lawyer also served him with a copy that same day.

After reading RCW 2.24.050, Mr. Didier became convinced that if he moved for revision of the commissioner’s order within 10 days, it would not be valid unless a superior court judge issued the same order after review. He did not move out of the family home on January 2, 2005. Instead, he filed and served a pleading² that included a “Demand for Revision” of the

¹ Mr. Didier titled this document “Abatement/Counter-claim” and within it attempted to enter a plea of “Subornation of False Muster.” Clerk’s Papers (CP) at 19.

² Mr. Didier titled this document “Demand for Judicial Review of Unlawful Court Commissioner’s Ruling Affidavit in Support of Federal Criminal Complaint”; it includes a mixture of legal arguments and biblical citations. Ex. 3.

commissioner's order on January 6, 2005. Ex. 3 at 2.

On January 8, 2005, while Mr. Didier was away, Ms. Didier, accompanied by relatives and friends, re-entered the home and hired a locksmith to change the locks. Before the locksmith could do so, however, Mr. Didier returned. Seeing his car, Ms. Didier hid in the bathroom while her friends locked the doors. Mr. Didier entered through a window, telling the others present to leave his home and demanding to speak to his wife. He asserted that the restraining order barring him from the home after January 2nd was invalid because of his "revision." He made similar assertions to the police, and also told them that he was bound by God's laws, not theirs. The police nevertheless arrested him.

Procedure

The State charged Mr. Didier with residential burglary and with violation of the restraining order. A state-licensed lawyer represented Mr. Didier during a jury trial. Mr. Didier did not dispute that the commissioner had ordered him not to enter the family home after January 2nd and did not dispute that he did not comply with that order. The defense theory was that Mr. Didier lacked intent to commit a crime and did not knowingly violate a valid order because of his incorrect belief that the commissioner's order was not binding after he moved to revise it.

During cross-examination of Ms. Didier's civil lawyer, Mr. Didier solicited and obtained testimony that Mr. Didier had sought revision of the commissioner's temporary order but that the temporary order remained valid because the motion was merely pending. In his own testimony, Mr. Didier continued to insist that the commissioner's order was non-binding because he had

“revised” it. 3 RP at 392. During his testimony, he successfully moved for admission of his pleading that sought revision; this pleading contained a copy of the text of RCW 2.24.050.

Concerned that the combination of Mr. Didier’s testimony and the admission of the statute created a false impression as to the law, the trial court instructed the jury using the text of Pierce County Local Rule (PCLR) 7(g)(2):

All orders granted by a court commissioner shall remain valid and in effect pending the outcome of the motion for revision, unless stayed pending the outcome of a motion for revision by the court commissioner granting the order, the Presiding Judge or the judge to whom the motion for revision has been assigned.

The text of instruction 11 matches that of the rule.³ Mr. Didier objected to this instruction as a comment on the evidence, but the court disagreed:

I don’t believe it is a comment on the evidence at all. It is an actual statement of what the law is, and right now, the jury is left with a misunderstanding of what the law is.

The issue that you and your client would care about that the jury is going to have to struggle with is whether or not the defendant knew that the order was valid. That’s the evidentiary issue, but what the law is, he has not stated the law accurately to the jury and I’m not -- it’s my job to instruct them on the law, not his job, and I’m not going to leave them with a misimpression of what the law is.

4 RP (May 23, 2005) at 436-37.

At the beginning of its closing, the State cautioned the jury that the issue was not whether Mr. Didier was a good or bad person. Both the State and Mr. Didier focused on whether he subjectively knew the restraining order was valid and in effect, and, by logical extension, whether he intended to commit a crime while he was in the home on January 8, 2005, discussing at some

³ The only difference is that instruction 11 substitutes the article “the” for “a” in the phrase “outcome of the motion.” CP at 121.

length the definition of knowledge and the permissible inference that the defendant knew the order to be valid if a reasonable person would have known it.

The State also argued, separately, that disagreement with the laws of the State is not a defense; as an example, the State noted that immigrants must follow U.S. law, even if an immigrant comes from a country where it is legal to abuse one's spouse. The State made no claim that Mr. Didier had himself committed any abuse, instead focusing on his testimony that he rejected much civil authority and jurisdiction. Mr. Didier did not object.

During Mr. Didier's closing, he argued that the court commissioner had completely rejected his submissions at the temporary order hearing. In rebuttal, the State responded by arguing from the commissioner's order itself, pointing out that the court had crossed out certain requests made by Ms. Didier, implying that Mr. Didier had prevailed on those points. In particular, the State argued that the deletion of the section prohibiting Mr. Didier from possessing deadly weapons showed that Mr. Didier had understood the proceedings and won some points. To support its argument that it was Mr. Didier who would have wanted this deleted, the State argued that Ms. Didier's lawyer had proposed the original language, that Mr. Didier had testified about his earlier political efforts in support of Second Amendment rights, and that Ms. Didier and her companions had sought to remove Mr. Didier's guns when they re-entered the home. Mr. Didier objected, unsuccessfully, but only on the ground that some of the State's arguments were not supported by the evidence.

The jury convicted Mr. Didier of both charges. The court imposed a standard range

sentence. Mr. Didier appeals, challenging only the instruction regarding the validity of the commissioner's orders and the claimed prosecutorial misconduct.

Comment on the Evidence

Mr. Didier argues that instruction 11 constituted a comment on the evidence because it communicated to the jury that Mr. Didier's belief in the order's invalidity was unreasonable and thus prevented him from arguing his theory of the case. We disagree.

When instructions are challenged, we consider them as a whole, and they are sufficient so long as they properly state the applicable law, do not mislead, and permit the defendant to argue his theory of the case. *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). Our review of challenged instructions is de novo. *State v. Woods*, 143 Wn.2d 561, 590, 23 P.3d 1046, *cert. denied*, 534 U.S. 964 (2001). The Washington State Constitution forbids trial judges from commenting on trial evidence. Const. art. IV, § 16; *Woods*, 143 Wn.2d at 590-91. A judge's jury instruction constitutes a comment on the evidence if it reveals the judge's personal evaluation of the merits or allows an inference that the judge either believed or disbelieved some of the evidence. *State v. Deal*, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). But an instruction that merely accurately states relevant law is not a comment on the evidence. *Woods*, 143 Wn.2d at 591.

We note first that, as Mr. Didier concedes,⁴ the legal validity of a restraining order is a preliminary question for the judge, not a factual element to be determined by the jury. *State v. Miller*, 156 Wn.2d 23, 24, 31, 123 P.3d 827 (2005). As the challenged instruction in this case

⁴ Motion for Extension, filed December 1, 2005.

deals exclusively with the legal validity of the order, we are not faced with an instruction that arguably provides the court's conclusions about an element, such as in *State v. Jackman*, 156 Wn.2d 736, 132 P.3d 136 (2006).

Instruction 11 did not comment on the evidence. The instruction was first and solely an accurate statement of law, setting forth the terms of PCLR 7(g)(2) with no elaboration or interposition of facts. For the same reason, the instruction did not convey the trial judge's personal opinion about the merits of the case or any evidence in the case. Under these traditional tests, the trial court did not comment on the evidence.

Nor did the instruction obstruct or comment upon Mr. Didier's theory of the case. The disputed issue at trial was not the actual legal validity of the order, but Mr. Didier's subjective knowledge of whether the order was valid (and therefore in existence). Although Mr. Didier personally espoused his belief that the order was invalid because of his attempted revision, the defense did not advance this claim to the jury; indeed, the defense elicited evidence of the order's validity and argued its validity to the jury. Mr. Didier's subjective knowledge was at issue, not whether his conclusion was accurate. The court allowed this defense argument and the State responded on its merits,⁵ with both sides arguing whether Mr. Didier actually knew the order to be valid and whether he intended to commit a crime.

Instruction 11 did not comment on Mr. Didier's knowledge or otherwise prevent him from advancing this theory of defense.⁶ While it set forth the rule governing the validity of orders

⁵ We are not asked to pass on the validity of this theory of defense.

⁶ Indeed, it did no more than confirm the accuracy of legal opinion testimony sought and obtained

pending motions for revision, it did not comment on whether Mr. Didier had access to this rule or on whether Mr. Didier would reasonably be aware of this rule. The instruction accurately stated the law, allowed Mr. Didier to argue his theory of the case, and did not convey the judge's opinion about Mr. Didier's knowledge; the court did not err.

Prosecutorial Misconduct

Mr. Didier argues that the State committed misconduct during its closing and rebuttal arguments when it used an analogy involving physical spousal abuse and when it drew attention to his possession of guns. Mr. Didier did not object to either argument as misconduct at trial.

We will not reverse for prosecutorial misconduct unless the prosecutor (1) acted improperly and (2) prejudiced Mr. Didier's right to a fair trial. *See State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). When evaluating purportedly improper remarks, we consider them in the context of the entire case, including the entire argument, the issues presented, the evidence at issue, and the court's instructions. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). There is reversible prejudice only when there is a substantial likelihood that the conduct in question affected the jury's decision. *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Mr. Didier bears the burden of proof. *See Stenson*, 132 Wn.2d at 718. And if the defense failed to object to the claimed misconduct at trial, the error is waived "unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not

by the defense.

have been” remedied by a curative instruction. *Russell*, 125 Wn.2d at 86.

Mr. Didier’s trial presented unique issues to both counsel, as the testimony frequently and necessarily touched on such sensitive and potentially sensational issues as religious belief and refusal to submit to secular laws. With the exception of the locksmith, all the civilian witnesses testified regarding religious beliefs and issues. Reviewed in context, we cannot find the challenged arguments to be misconduct or prejudicial to Mr. Didier. Arguments in such a case could easily become emotional appeals to the passions and prejudices of the jury, but both counsel provided thoughtful and rational arguments focused on the unique issues of the case.

Significantly, the State repeatedly urged the jury not to reach a verdict based on its assessment of whether Mr. Didier was a good or a bad man, going so far as to tell the jury not to convict based on Mr. Didier’s unusual philosophy. The State structured its closing around the elements of the charged crimes and the credibility of the witnesses.

Mr. Didier’s own testimony before the jury included assertions that he was a “citizen of heaven,” not a U.S. citizen or Washington resident. 3 RP at 381. He objected to being subject to Washington’s courts at all. He volunteered that he drove using a church-issued driver’s license. Given this testimony, the State argued to the jury that a person who chooses to be in Washington is subject to its laws, and if that person also chooses to violate the law, that person pays the consequences. The brief analogy to spousal abuse was perhaps unwise, but the State did not argue that Mr. Didier had abused Ms. Didier or was likely to do so in the future.⁷ The focus of this portion of the argument was simply that, whatever Mr. Didier’s beliefs, he was still subject to

⁷ And indeed, the State presented the jury with testimony about the lack of any physical violence.

the laws of Washington. This was proper argument, and the brief analogy (10 lines of text in a 23-page closing) did not convert a proper argument focused on the elements to an improper one.

Mr. Didier also objects to a portion of the State's rebuttal argument, in which the State argued that the commissioner, in entering the temporary order at issue, struck a prohibition on possession of weapons at Mr. Didier's request, rather than Ms. Didier's. In support of this inference, the State argued that one of Ms. Didier's first acts upon re-entering the home was to remove Mr. Didier's guns. The State made this argument in direct response to a portion of the defense closing, in which Mr. Didier argued that the commissioner had rejected all of his arguments. "It is not misconduct . . . for a prosecutor to argue that the evidence does not support the defense theory," and "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." *Russell*, 125 Wn.2d at 87.

This portion of the State's rebuttal argued reasonable inferences from the admitted evidence, and the State quickly returned to its theme that Mr. Didier's active and partially successful participation in the hearing meant that he knew the commissioner's order was binding and valid. This argument was not misconduct.⁸

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

⁸ Mr. Didier also argues that his lawyer provided ineffective assistance by failing to object to the arguments he now claims were prosecutorial misconduct. As we find no misconduct, this argument also fails.

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Bridgewater, J.

We concur:

Houghton, P.J.

Penoyar, J.